

REVIEWS

MOORE'S JUDICIAL CODE: COMMENTARY. By James Wm. Moore. Albany and New York: Matthew Bender & Co., 1949. Pp. viii, 684. \$10.00.

THIS does not look like an important book. It is printed by some sort of offset process that is easy to read but gives no joy to the eye accustomed to Caslon or old style. It has an adequate index, but it lacks those essentials, tables of cases and statutes. Styled a Commentary on the Code, it does not follow the order of topics in the Code, nor does it touch upon all its provisions. Its section-numbering and its cross-references are keyed to the number-system of the author's three-volume treatise on Federal Practice which in turn is keyed to the Federal rules. I have always found that Moore's numerology gets in my way.

These trivia are worth mentioning only to warn the reader not to be misled by the unimpressive form of the book. It is written in a style admirably adapted to the matter—terse, clear and forthright. Its contents make it invaluable not only to practitioners but to scholars as an interpreter of the new Code. The author's qualifications of experience for the task—special assistant to the Advisory Committee on the Federal Civil Rules, consultant in the drafting of the Code,¹ writer of the leading treatise on Federal Practice, and distinguished teacher of the subject—are unique. His treatment includes, of course, the changes accomplished by the amendatory Act of 1949. At this writing the volume under review is the first resort for ready research on the history and organization of the federal court system and the background and effect of the more important Code provisions. In my sampling of the contents, I found the discussion of the following topics especially enlightening and readable: Salient Features of the Code; Résumé of Changes (pp. 81-97), Venue and *Forum Non Conveniens* (pp. 169-211), Removal (pp. 215-88), and A Survey of *Eric v. Tompkins*² (pp. 307-359).

To one like myself who hoped for a scientific replanning of the federal judicial business, the Code falls far short. Moore's estimate of the Code is understandably reserved but on the whole favorable. "In changes of substance it does not go as far as many would undoubtedly wish. In details it is undoubtedly disappointing to some. On the whole it is a conservative revision that avoids large controversial changes, but without hesitating to make impor-

1. An example of his constructive contributions as consultant is his proposal "(a) that improper venue should not result in a dismissal but only the basis for a transfer of an action, and (b) that the district court be given the power to transfer an action, even though the venue be proper, to a more convenient forum" (p. 206), embodied in §§ 1406 and 1404, respectively. It is arguable (though a comment on the timidity of the plan) that these are the boldest and most salutary changes accomplished by the Code.

2. Outstanding here are the masterly survey of the effect of *Eric* on the Rules (pp. 317-31) and the useful reconnaissance of Federal Common Law (pp. 340-59).

tant changes that were justified to the vast majority of those impartially concerned, although unsatisfactory to special interests and special pleaders. . . .

"These are only some of a great many changes made by the Code, which are subsequently treated in detail. They suffice, however, to illustrate the objective of the Code: repair and modernization of the federal judicial system without basic alteration of the main structure." (pp. 72, 74).

The approach by the federal courts to problems of jurisdiction as a part of the "mystery" of the judicial guild is still prevalent. Presumably the judges cannot actually escape the dominion of unspoken assumptions of policy and justice,³ but it is still the custom to say in passing on jurisdictional questions: "Our own ideas as to the wisdom or desirability of such a statute or the constitutional provision authorizing it are totally irrelevant."⁴ This professed indifference to justice and convenience in passing on questions of federal jurisdiction sets the tune for briefs and arguments and discussion of such questions in routine texts. It was Holmes the scholar, not the judge, who said: "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. . . . Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; . . ."⁵ Moore sees clearly enough that the springs of decision here as elsewhere are considerations of expediency and justice. His emphasis upon them is discreet. Frequently his policy thunder is in the footnotes. But it is positive and pervasive. Thus after alluding to "a past tendency that makes a fetish of federal jurisdiction," he continues:

"But the substantial reversal of that tendency must come from a clearer realization by the courts of the proper role of federal jurisdiction. The federal courts are courts of limited jurisdiction; jurisdiction represents the distribution of judicial power in our federal system as blueprinted by the Constitution and declared by Congress; and the federal courts ought therefore to be mindful that they stay within defined limits. These are broad working principles and ought not to be applied destructively. Yet under the most respectable authority adjudications on the merits go for naught where lack of federal jurisdiction is discovered, often late in the proceeding, and even at the appellate stage, with the deficiency sometimes raised by the party that invoked the federal court's jurisdiction, or by the appellate court on its own motion. Such doctrines do not

3. See Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 260 (1950).

4. Justice Jackson in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949) (aggregated minorities hold constitutional, rejecting each other's reasons—a provision that citizens of District of Columbia and territories are citizens of a state for diversity purposes).

5. THE COMMON LAW 35-6 (1881). See also the interesting dissenting opinion of Judge Frank in *Magnetic Engineering Co. v. Dings Mfg. Co.*, 178 F.2d 866, 871 n.3 (2d Cir. 1950) ("Some lawyers seem to consider it scandalous that a court should ever state that it is prompted by a sense of justice to reach a result, even within the allowable limits").

increase the respect for judicial administration, and are not necessary for the preservation of the proper distribution of judicial power." (pp. 160-1).

A similar willingness to challenge entrenched tradition is manifest in his suggestion that the doctrines which allow a party to attack federal jurisdiction after a trial on the merits "should be reappraised and rejected," (p. 280) and in his arguments for modernizing federal evidence rules along the lines of the American Law Institute's Model Code of Evidence (p. 326), for abandoning the doctrine which denies recognition in the federal courts of new "equitable remedial rights" accorded by the state (p. 334), and for applying a uniform national common law to claims of "multi-state" unfair competition when joined with related claims under the copyright, patent, or trade-mark laws (pp. 346-8).

My reading raised many points on which issue might be drawn. Isn't the saying which the author repeats (p. 59) that the Federal Declaratory Judgment Act has not enlarged federal jurisdiction (though true in a sense) largely a delusive play on words when we recognize that it enables plaintiffs to isolate, as they could not before, federal questions in the complaint, and likewise often in cases involving long-term contracts such as insurance policies and leases enables them to embrace in the jurisdictional amount instalments coming due in the future?

When he follows custom in describing jurisdiction over cases arising under the Federal Constitution and laws, as "federal question" jurisdiction (pp. 135, 128), doesn't he obscure the truth which needs to be emphasized that "cases arising" are not alone cases involving federal questions but equally often merely suits upon causes of action created by Acts of Congress,⁶ quite irrespective of whether any dispute occurs about the interpretation of federal law? This alternative meaning of "cases arising" is doubtless understood by the author⁷ but the stress on "federal question jurisdiction" as if it covered the field, tends to obscure it.

In what sense are we to understand the statement (p. 165 and see p. 221) that the federal courts have no general original *quasi in rem* jurisdiction? Doesn't the jurisdiction under Section 1655 of the new Code (and its predecessor statutes) over suits to enforce claims to, or liens upon, or to quiet title to land or personal property within the district, upon non-resident notice or publication service, meet the description? Finally, the author with the Revisers believes that the change in Section 1441(c) from "separable controversy" to "separate and independent claim or cause of action" as a basis for removal will operate to diminish federal business (pp. 215, 244). or Will the law review commentators who predict the opposite⁸ prove to be right? Such

6. This is the phraseology used by Justice Holmes in *American Well Works v. Layne and Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action").

7. He cites (p. 142, n.24) approvingly the clearest exposition of it, i.e., Judge Amidon's opinion in *McGoon v. Northern Pacific Rr. Co.*, 204 Fed. 998 (D.N.D. 1913).

8. See Notes, 44 ILL. L. REV. 397, 401 (1949), 33 MINN. L. REV. 738, 743 (1949).

questions merely serve to point up the provocative quality of the book and the author's willingness to stand up and be counted on debatable issues.

The Field Code of the '40s raised the pennant of leadership in the improvement of judicial procedure among English speaking peoples, on this side of the Atlantic. With the revolution accomplished in the '70s in Britain by the Judicature Acts and the new Rules of the Supreme Court the banner went back to the Strand. It well may be that for another quarter-century our federal system through the Rules of Civil Procedure and the new Judicial Code will furnish the most influential guidance in the Anglo-American world for progress in court procedure. If this should be so, Moore through his realistic but forward-looking work as consultant, as writer of the leading treatise in the field and now of this Commentary on the Code, will have to be credited with a strong assist.

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THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER: SOME REPRESENTATIVE OPINIONS.* Selected and edited by Samuel J. Konefsky. New York: The Macmillan Company, 1949. Pp. xviii, 325. \$4.50.

PROFESSOR KONEFSKY has chosen a very modest part in this book. He starts it off with half a dozen quotations about the Justice, adds a dozen prefatory paragraphs of his own, and thereafter confines himself to neat little introductions to the forty odd selected opinions which he offers us as significant and representative of the Justice. A reviewer cannot very well help reviewing the subject instead of the book.

The Constitution is to Frankfurter, as it is to any good Justice of our Supreme Court, a composition in two themes, the legal and the democratic process, which are hard enough to make harmonious. But I think Frankfurter finds it harder than most to make them so. For in him each theme is unusually developed, the more itself, and the farther, therefore, from the other. This is not because Frankfurter's attitude toward the law is academic, nor because he is learned in the law. It is because he is thoroughly and fastidiously lawyerlike. No one who is not a lawyer will quite understand what I mean or quite appreciate the praise. And democracy is more vivid to Frankfurter than it is to those of us who were born into it and who vegetated in it during the first decade of our lives. Seedlings thrive best when they are transplanted at the right time. So with Frankfurter. Or put it this way, he has a romantic love for democ-

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* The JOURNAL solicited two reviews of this book on the assumption—which was subsequently borne out—that divergent opinions would be expressed. These reviews were written independently and neither reviewer was given a chance to see the other's work before completing his own.

racy. Democracy is more a wife to him than a mother. He courted her, he married her, he was not simply born of her.

On the political side, Frankfurter's distinguished as well as distinguishing characteristic is his concern for the distribution of power in a democracy. We know now that the separation of powers is matter of fact as well as matter of law. Matters which we lawyers treat as law often have a way of justifying our exaggerations and overstatements about them by revealing themselves as also matters of fact, too often against our protests and in spite of our lack of appreciation of how right we were. Surely this is so of the doctrine of the separation of powers, and it makes the questions it raises the more difficult. They are difficult enough to start with. For they are questions of Who shall decide?, not What shall be the decision?, and the Who must be answered after the What has already been given an answer, however strongly you feel the answer was wrong. Nevertheless, and despite everything, the wrongness of the decision is beside the point. Congress, a state, or the commission, or whoever, is as free within its competence to be wrong as the Court itself.

Frankfurter's concern, of course, appears most obviously in the part which the Supreme Court should play, and in several ways. First is his insistence that every appellant answer the primary as well as preliminary question which every appellant owes to a court of limited jurisdiction, "How did you get here?" But demands are made upon the judicial power which, as Frankfurter has said, "cannot be met by verbal fencing about jurisdiction." Such was the case, for example, in *Colegrove v. Green*,¹ where three Illinois voters asked the Court to restrain the Governor of Illinois from conducting the election in November 1946 on the basis of an apportionment made in 1901, forty-five years before, on the ground that the population of voters had so shifted that some votes were only a ninth as effective as some others. Professor Konefsky reprints Frankfurter's opinion for the Court refusing to do so (over three dissents), "because due regard for the effective working of our government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination."²

Second is Frankfurter's lawyer-like reserve on the scope of the meaning of definite words. The example which I like to cite is also one which Professor Konefsky reprints, *United States v. Lovett*.³ Reread Frankfurter's concurrence, and you too will be again torn between yourself as a democrat and your other self, the lawyer. One of you will want to stretch the legal term, bill of attainder, far enough to protect the democratic decencies, doing for Congress what Congress in this case ought so plainly to have done for itself. The lawyer in you will render unto Caesar the tasks as well as the tithes. The democrat will be ashamed of his representatives.

1. 328 U.S. 549 (1946).

2. *Id.* at 552.

3. 328 U.S. 303, 318 (1946).

I wonder if Stone did not misname this lawyer-like reserve when he called it simply self-restraint in his dissent in the AAA case.⁴ It has never seemed to me that self-restraint alone, without some purpose, quite met the problem. I'd sooner say humility, for humility toward the competence of others has its counterpart in pride in your own, and we are dealing with a balance between two forces, not simply a measure of one. The Court is collaborating, not interfering, and a good collaborator must have pride in his own work as well as respect for others'. Humility, moreover, is something we can judge not only in terms of its own failure, in terms of its opposite, such as the arrogance of the Old Court in its last—may it be its last—stand in defense of property rights as such and for their own sake, and also the zeal with which some now want to assert and protect the liberties of the individual even at the expense of everything else we also value. As to that, I am sorry Frankfurter's concurring opinion in the second loudspeaker case, *Kovacs v. Cooper*,⁵ came down too late for Professor Konefsky to include some of it, but this is equally true of future opinions. Frankfurter's world is a world on the wing, and anyone who would hit it must give it a long lead.

But when we come to the cases where the language of the Constitution gets vaguer, and the Court's responsibility rises, here the tables turn. Reread Frankfurter's concurring opinion in the *Adamson*⁶ case, part of which Professor Konefsky includes, or better yet what Frankfurter said when he spoke for the Court in the *Wolf*⁷ case, too recently for Professor Konefsky to use it. The Court refused to shirk the responsibility which the application of vague words like the due process clause necessarily gives to everyone who must apply them to particular cases. And yet the very Justices who were most eager to stretch a definite phrase bolt at the burden of this responsibility and run to the shelter of what they say were the intentions of the Founders and what they call the more clearly marked boundaries of the Fourth and Fifth Amendments.

Frankfurter finds it hard to reconcile legal doctrines and the political process, because he is so keenly aware of both. How does he do it? How does he mediate between the lawyer in him and the statesman? Perhaps because he has the qualities of the trial judge, who must handle in little the same matters which the statesman must handle on a larger scale. The trial judge has to draw together, with infinite tact and sagacity, the concrete facts which a lawyer is so thoroughly trained not to understand and the law in which he is so thoroughly trained that he can understand nothing else. Frankfurter has the sensibility, the intuitive tact, Pascal's *esprit de finesse*, which is just as necessary a quality in the constitutional lawyer as it is in the trial judge. Both have to be as sensitive to the human patterns as they are to the legal abstractions into which they must be transposed.

4. *United States v. Butler*, 297 U.S. 1, 79 (1936).

5. 336 U.S. 77 (1949).

6. *Adamson v. California*, 332 U.S. 46 (1947).

7. *Wolf v. California*, 338 U.S. 25 (1949).

Is Frankfurter a liberal or a conservative? Is he less liberal or more conservative than he used to be? Is he more or less than the other Justices for or against the liberties of the individual? For a moment, let me assume that these questions mean something more significant than our own approval or disapproval of what Frankfurter said or did then and now. For I want to discuss some recent attempts to answer these questions statistically, such as Pritchett's book on the Roosevelt Court⁸ and Irving Dilliard's article in the *Atlantic Monthly* last December.⁹ Why Dilliard, with all his knowledge of the Supreme Court, as great as any layman and greater than most lawyers, turned to statistics for an answer, I can't make out.

And such statistics! Dilliard calls them a box score. He takes the civil rights decisions on which the Court splits and then counts the Justices' votes for or against civil rights. In the last three terms of court, 1946-1949, in fifty-seven times at bat, Murphy, Rutledge, Douglas, and Black lead, in that order. Frankfurter came fifth with no more than twenty-three hits and thirty-four strike outs. The three Truman appointees did the worst, which is the point Dilliard wants to make.

If judicial decisions were like base hits, this box score is right, and legal scholars would use statistical analysis, as Dilliard says they are going to use it, more and more. And, to be sure, this is the right approach for anyone who is interested only in the protection of our civil rights to the exclusion of every other consideration which may properly lead to a decision. Dilliard says he puts them first. So do I. I heartily agree that individual liberties come first, but even if they are higher in rank and dignity than considerations of second rank and of less dignity, these are not to be excluded from concern. I give you the *Bridges* case,¹⁰ where freedom of speech was pitted against the security and serenity which is indispensable to the judicial process. Which was the matrix here? Reread Frankfurter's dissent, most of which Professor Konefsky has reprinted.

Frankfurter stands just half way down Dilliard's list. If this indicates anything, it shows that Frankfurter is wise enough and conscientious enough to be more discriminately concerned than any other Justice with all the various considerations which go to make a judicial judgment. For he stands at the median point in the list. If we were to press the point, Black and Jackson come next in these judicial qualities, for one stands just above him and the other just below him. In Pritchett's table for the 1941-1946 terms of court,¹¹ Frankfurter shares the median with Stone, and Douglas and Jackson occupy the next two nearest places.

If the statistical approach means anything, it seems to me that the honors go

8. PRITCHETT, *THE ROOSEVELT COURT* (1948).

9. Dilliard, *Truman Reshapes the Supreme Court*, *Atlantic Monthly*, Dec. 1949, pp. 30-3.

10. *Bridges v. California*, 314 U.S. 252 (1941).

11. PRITCHETT, *op. cit. supra* note 8, at 254, Table xxiii.

to the men on the median, the Justices who would stand at the top of the graph, if you put these statistics on a curve. But I am no statistician. I am against statistics, not only because they don't prove anything, unless it be what I have just been saying, but because they distract our attention from what is important. It is not the Justices that we ought to be thinking about, but their decisions. Go behind them into personalities, if you please, but only the better to understand the decisions. For it is they, the decisions, which affect our lives and our hopes, and, to be practical, it is much easier to do something about a decision than about a Justice. Many more decisions have been overruled than Justices have been impeached. In fact, none of the Justices have been impeached and during the twelve years from 1937 to 1949 thirty decisions were overruled, many more than Justices who died, or who retired in an atmosphere of our disapproval.

Any who will read even a good part of these forty odd of Frankfurter's opinions will very quickly learn what he will never get from the most startling statistics. He will see how receptive Frankfurter is to every relevant consideration, how he gathers them in and puts each in its place. He will come to recognize at first hand the humility, and yet the pride, with which he serves the judicial process. And finally he will learn how conscientiously, and on the whole successfully, he counterpoints the high clear tunes of legal doctrines with the deep melody of democracy.

CHARLES P. CURTIS†

THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER: SOME REPRESENTATIVE OPINIONS. Selected and edited by Samuel J. Konefsky. New York: The Macmillan Company, 1949. Pp. xviii, 325. \$4.50.

JUSTICE FRANKFURTER has been described in the *Columbia Law Review* as "the long-time comfortably contemplative scholar, fighting a few good fights on the legal level, but too easily drawn up short by a somewhat schizophrenic reverence both for the Supreme Court as an institution and for the dissenting justices who constantly looked at its most meaningful works and called them bad; coming himself to the Court with a more or less conscious determination to wear simultaneously the mantles of Holmes and Brandeis and yet speak for a Court majority; allowing this adulation-bred ambition to freeze into a myopic unawareness that progressivism, by its very nature, cannot be static, and that what was fine and brave in 1920 may carry no bite in 1941; and so tending all too often today to skip from handed-down premise to foregone conclusion with a debonair disregard of down-in-the-dirt substance—a spry and cocksure authoritarianism—that even the most elegant of language cannot quite conceal." Nine years and more than three hundred opinions later, I'm afraid that—smug as it

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will inevitably sound—I see no reason to revise my 1941 estimate¹ of Felix Frankfurter.

Nor, in my possibly prejudiced way, can I see any reason for the publication of this little volume of essays on constitutional law by the not-quite-ex-professor. ("Essays" is used advisedly; in less than half of the 44 opinions here reprinted did Justice Frankfurter speak for a Court majority.) Somehow I doubt that the book can be of much use to lawyers, law professors, or judges—all of whom, despite editor Konefsky's brief and sometimes surprisingly acute prefatory notes to explain each opinion, will probably still prefer their cases whole from the United States Reports instead of cut, trimmed, and neatly arranged like flowers. As for the laymen, I can't quite see them rushing to study a smattering of one Associate Justice's written-work for general legal enlightenment—and few if any are likely to turn to judicial prose, however graceful, for sheer esthetic pleasure. Indeed, I am reluctantly drawn to conclude that the printing of this pre-memorial volume was predicated solely on the hope of its sale or gift to Felixphiles, to set on their bedside tables for inspirational reading.

Hence my own inclination would have been to pass the volume by, unwept, unhonored, unsung—and unmentioned. But the book-reviewing clan—many of them members of the Justice's Cambridge clique, others awed by the fact of his Justiceship and meek, if not incompetent, to judge him—have been using the book as an excuse to make such a terrific to-do about the Justice as to wring from me this timorous dissent. In a sense, I know, it is silly to bother; no made-up minds are going to be changed at this late date by a re-affirmation of my own long-made-up doubts of Frankfurter's greatness. And so if I take here a few pot-shots at what seem to me three of the major myths that support the full-blown Frankfurter legend, it is only in the feeble hope that I may tinkle an occasional bell in the minds of the unbewitched.

The first myth—and far and away the most widely accepted, even by many non-acolytes—is that Frankfurter is the great apostle and practitioner of something called "judicial self-restraint." The Justice himself has proclaimed it—notably in his damn-it-all-fellows-I'm-a-liberal-too dissent in the *Barnette* case²—and the notion has been given wide currency by the Powell-Schlesinger-Curtis-Freund crowd in their desperate effort to defend or explain away their hero's judicial indifference to state violations of civil liberties. Leaving aside the rather fascinating philosophical riddle whether judges do not *decide* specific issues just as surely when they restrain themselves from acting, in cases properly brought before them, as when they affirmatively act, a couple of other questions come to mind. Is "judicial self-restraint" only judicial or only self-restraint when applied to *legislative* policies? Certainly, several members of the Court—sometimes tarred with the epithet "activists"—have been far more

1. Book Review, 41 *Col. L. Rev.* 769 (1941).

2. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 646 (1943).

reluctant than Justice Frankfurter to impose their judicial better-judgments on the executive and administrative branches of government, in antitrust cases, labor cases, rate regulation cases, and others. Yet even accepting, *arguendo*, the narrow view of "judicial self-restraint"—as meaning the grudging use by judges of constitutional doctrine to strike down written laws (or to reverse actions taken with clear legislative approval)—is it only judicial or only self-restraint when applied to certain *kinds* of laws, like compulsory flag-salutes? For the fact is that Justice Frankfurter has long been the Court's spear-head in striking down state tax statutes in the name of the commerce clause—and this over the constant dissent of the Court's alleged "activists." Moreover, there is even less mandate in the words of the Constitution for this brand of judicial bossiness than for the protection of civil liberties from state infringement. Thus brought down to cases, the famous Frankfurter "self-restraint" turns out to be a highly selective affair, involving *inter alia* a lesser solicitude for human beings deprived of civil rights by state action than for interstate businesses deprived of money by state taxes. Justice Frankfurter is scarcely unique in exercising self-restraint when he himself chooses to be self-restrained; he is unique only in claiming for his personal selectivity a special and high-minded virtue.

The second myth attributes to the Justice an extraordinarily high quality of lawyerly craftsmanship; it is said that his mind works with such fine legal and logical clarity that, regardless of what result he reaches, the reasoning by which he reaches it is never slipshod, fuzzy, or grotesque. In many fields of law I do not pretend to enough expert knowledge to weigh this claim—although I do recall that in his famous *Hutcheson*³ opinion, putting labor unions practically out of reach of the antitrust acts, his strained and roundabout device of telescoping two quite separate statutes seemed to me to warrant, though I liked the holding, Justice Roberts' angry dissent against "a process of construction never, as I think, heretofore indulged by this court." But in the tax field, with which I have a forced familiarity, the claim of Frankfurterian craftsmanship simply does not stand up. Ever since a few of his early tax opinions, which were able—and were also, like *Helvering v. Hallock*,⁴ largely re-writes of old dissents by Holmes, Brandeis, or Stone—Frankfurter has done more than any other Justice to confuse and muddle tax law. A score of examples could be cited off-hand; here are three that appear in the Konefsky collection:—In *Northwest Airlines v. Minnesota*,⁵ Frankfurter, blinkered by one of Holmes' less fortunate opinions, based his decision on so flagrant a misstatement of past law as to leave lawyers utterly uncertain what the law now is and to earn for himself a rare rebuke from his usual apologist, Professor Powell. In *New York v. United States*,⁶ Frankfurter's "opinion for the

3. *United States v. Hutcheson*, 312 U.S. 219 (1941).

4. 309 U.S. 106 (1940).

5. 322 U.S. 292 (1944).

6. 326 U.S. 572 (1946).

Court" was so awkwardly argued that only one other Justice subscribed to it, with qualifications, and both the concurring and dissenting opinions made open fun of the Frankfurter logic as downright nonsense. In *Freeman v. Hewit*,⁷ Frankfurter resorted to an old-fashioned semantic absolutism so inherently meaningless that the concurring opinion again tore it to shreds (read it and see) and that the branch of tax law involved has since been in complete chaos as a *direct* consequence. There is also *Wisconsin v. J. C. Penney Co.*,⁸ which Konefsky mercifully does not reprint. There Frankfurter, in the course of achieving an admirable result, managed to enmesh a simple issue in a syllogism so patently preposterous that it touched off a spate of otherwise pointless litigation—which, in turn, forced the Supreme Court, some four years later, to flatly repudiate, not Frankfurter's result,⁹ but the entire reasoning process by which he reached it. So much for the Justice's legal craftsmanship.

The third myth, presumably implicit in the publication of a collection of his opinions, concerns Frankfurter's supposedly great contribution to the Court as an institution. Concededly, this sort of thing is hard to measure; contribution may be qualitative if it is not quantitative, or it may come in the conference room if it does not appear in the reports. Concerning Frankfurter's qualitative contribution, there is, to put it mildly, considerable disagreement; my own skepticism, sketchily suggested above, is by no means a deviational view in the profession, as he who inquires may discover; indeed, I have long observed that the quality of Frankfurter's work is most infrequently touted by any but those lawyers who are personally or emotionally attached to the man, usually through the old school tie of Harvard. As for any major contribution in the conference room, it has become common knowledge—so much so that even Schlesinger off-handedly notes it—that to his brethren, as to attorneys before the Court, Frankfurter is less an influence than a common scold. All this aside then, the only substantial and irrefutable measure of the Justice's contribution lies in the bulk and the impact of his written opinions. This involves more than mere numerical counting; Frankfurter turns out more opinions per term than almost any other Justice. The point is that the overwhelming majority of those opinions are written, not for the Court, not for the institution, but for the Justice's personal satisfaction—plus perhaps the information of putative future biographers. Thus, during the past three full terms of Court, Frankfurter produced 123 opinions; of these, only 31 were written "for the Court" (though, in the same span, Black and Douglas between them wrote 135 majority opinions); the remaining 92—almost precisely three-fourths of Frankfurter's total output—were concurrences, dissents, or hybrids, exerting in themselves no present influence on the law and making no contribution whatever to the real work of the institution. If it be said, with Holmes and Brandeis in mind, that the

7. 329 U.S. 249 (1946).

8. 311 U.S. 435 (1940).

9. *Wisconsin Gas & Electric Co. v. United States*, 322 U.S. 526 (1944).

dissents may have some future value, be it remembered that the famous pair were great in dissent because they saved their dissenting fire for great issues; in Frankfurter's case, even an occasional fine dissent, as in *Harris v. United States*,¹⁰ tends to get lost in the welter of his querulous protests over trivia. As for the concurrences, perhaps Frankfurter's favorite form of self-expression, with rare exceptions they contribute literally nothing except unnecessary confusion. And lest I be accused of undervaluing all these special opinions that take up so preponderant a part of the Justice's working time, one final fact may be worth considering:—Last fall, the *Harvard Law Review*, the Justice's own school paper, published a fifty-page review of the Supreme Court's 1948–49 term.¹¹ During that term Justice Frankfurter had written no less than 32 dissenting or concurring opinions. Of those 32 opinions, exactly three were rated as worth so much as a mention—and these only by passing reference—in the entire text of the Harvard article.

Yes, in all conscience, it is mean of me or anyone to begrudge the Justice the little moment of pride and pleasure that publication of the Konefsky book may have given him. For Felix Frankfurter, who wanted so hard to be a famous Justice, is really a rather pathetic figure as he bustles his way toward historical obscurity. Meanwhile, in his unerring instinct for the quodlibetical instead of the quiddity, there still remains the capacity for much mischief.

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PREROGATIVA REGIS; TERTIA LECTURA ROBERTI CONSTABLE DE LYNCOLNIS INNE ANNO 11 H. 7. Edited by Samuel E. Thorne. New Haven: Yale University Press. 1949. Pp. li, 165. \$5.00.

READINGS at the Inns of Court had become, by Henry VII's reign, an essential part of English legal education. A series of lectures supplemented the dinners, masques, and moots that went to train a Tudor lawyer. But besides instructing the students at the Inns, the Readers also interpreted the law for practitioners and, on occasion, worked to shape it anew. Such was Robert Constable's *Tertia Lectura* at Lincoln's Inn during Michaelmas Term 1495 on *Prerogativa Regis*, then taken to be a statute.¹ The law in this little tract dated from Edward I's reign, probably 1272–1285; it prescribed the king's feudal rights over tenants in chief; but by 1495 confusions and contradictions so enveloped it that elucidation was badly needed.

Constable's *Reading* originally contained sixteen chapters, and Professor

10. 331 U.S. 145, 155 (1947).

11. 62 HARV. L. REV. 119 (1949).

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1. F. W. Maitland demonstrated that *Prerogativa Regis* was "a tract" and not a statute. 2 COLLECTED PAPERS 182–9.

Thorne has edited the ten surviving ones. He has enriched the Law-French text with abundant annotation and so has enhanced its usefulness to students of Anglo-American law. The footnotes, 404 in number, contain many parallel or pertinent passages quoted from other contemporary Readings on *Prerogativa Regis*—those by Frowyk, Brown, and two anonymous Readers in Henry VII's reign and two by Spelman and Staunforde in Henry VIII's. The notes also present, in an all too modest manner, a vast amount of erudition about real property law. In an introductory essay, Professor Thorne analyzes the rules of *tenure in capite* which Edward I's judges applied; the subsequent changes in them; the new constructions which Henry VII's lawyer-administrators, under the spur of mercenary motives, forced upon the law; and, finally, the Readers' rationalizations of current practices and their attempts to clarify ambiguous doctrines.

The fresh concern with *Prerogativa Regis* in 1495 resulted from Henry VII's ten-year exploitation of the king's feudal rights. The tract afforded ample accommodation for new constructions of the rules of tenure by which to sanction an augmentation of the royal revenues and a strengthening of regal policy. By establishing control over his tenants in chief, a control founded upon the common law, the king made men of property conscious of the novelty—a hard efficiency—of his governance. Painstakingly, Henry VII and his agents worked the law to ascertain just “who were tenants *in capite*,” and then his lawyers construed *Prerogativa Regis* in order to designate many more tenants as being “in chief.” A band of bureaucrats pressing the words of the so-called statute to a “drily logical extreme,” as legal experts are wont to do, found in old forms various devices to convert subtenants into the king's own. They added to the list, already long by 1485, of customary ways to bring the tenant of a mesne lord to hold directly of the king. They gayly presumed “knight service” when the nature of tenure was doubtful; chancery gladly issued licenses to alienate portions of land held *in capite*, “perhaps all but one acre” Thorne notes, in order to retain the old tenant while acquiring a new one; and Henry VII's “conscious policy of increasing the number of tenants *in capite*” brought more men of wealth within the king's administrative and political purview.

A strict, but ostensibly legal, enforcement of Henry VII's feudal rights worked to inure men of property to what Wolsey was soon to call the king's “most terrible power”—“his prerogative royal.” Prerogative wardship over a tenant's heir, for example, was stretched ingeniously in both law and practice to extend the king's control. Similarly, the rule of *primer seisin*—which allowed the king the issues and profits from lands held during the interim between a tenant's death and the livery of seisin to the heir—was construed to permit the king to seize those lands which a tenant *in capite* also held of other lords. In this instance, even the Readers, Constable and Frowyk, disagreed on the limits to which the king might go. Likewise, the widow of a tenant in chief seeking her dower was required to accept it from the king and so become a tenant *in capite* herself, hence liable to the burdens and penalties of the king's

prerogatives. In the same way, the rule governing the descent of lands to coparceners was extended to exact homage from each coheiress thereby increasing the number of the king's own tenants. Finally, the law governing the alienation of lands held by knight service was applied to socage tenants, too, and this device enabled the king's agents to uncover numerous "concealed lands" and to bring them within prerogative jurisdiction. Their success exposes the ease with which Tudor bureaucrats, once given some authority, were able to catch hold of more—especially when Readings at the Inns of Court condoned new-fangledness in the laws of tenure.

Professor Thorne's exposition of Constable's commentary is a masterpiece of critical analysis and historical summation. He identifies an hypothetical ordinance (one forbidding subinfeudation by tenants in chief without royal license which Edward III's pleaders assigned to 1236 or 1246) with a legislative writ of 1256. This enables him to reconcile, with convincing argument and evidence, several fourteenth-century statements that baffled Maitland. Professor Thorne's demonstration that Henry VII's administrative policy provoked changes in the rules of tenure *in capite* is a superb example of how recourse to history, rather than to symbolic logic, can best provide an understanding of how English law was made. His introduction shows that Henry VII used the common law, as well as conciliar justice, to increase his power, and this amplifies the standard explanations of the growth of Tudor monarchy. The king's desire to shrink the swollen purses of landed men doubtless prompted a manipulation of old laws; then the Readers at the Inns, with their subtle scanings of *Prerogativa Regis* and the statutes, helped to bring these tortuous practices "within the framework of the law." By so doing, they preserved the principle that the king should govern according to duly established procedures; and so, paradoxically, their Readings played a part in the never-ending struggle to keep England's law above her king.

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PRICING OF MILITARY PROCUREMENTS. By John Perry Miller. New Haven: Yale University Press, 1949, Pp. xv, 292. \$4.00.

"TAKE the profit out of war" has long been a crowd-catching slogan. It has an understandable appeal. And no one denies that profiteering in time of war—whether "hot war" or "cold"—is an unsavory, wasteful and morale-destroying activity that should be stamped out. But as John Miller so persuasively argues in this second of the series *Studies in National Policy*, it is both undesirable and unrealistic to propose the elimination of all chance for profit in war contracts.

One of the basic tenets of our democracy is that the maximum amount of reliance should be placed on private initiative as a means of getting things done.

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This we achieve mainly by means of a system of competitive free-enterprise. We rely, in other words, on the price system to allocate our resources and to furnish incentives to efficiency. Admittedly other institutions play a part. Admittedly in time of emergency auxiliary controls such as those administered in the last war by the OPA and the WPB are necessary to meet the unusual stresses of unusual times. But since the price system is the mainspring of our economy, and since it effectively furthers our democratic aims of "insuring respect for the individual, wide-spread sharing of economic and political power and a decentralization of decision making,"¹ Miller believes—and I agree with him—that every effort should be made to preserve the maximum use of that system in war and crisis as well as in peace. To surrender to the use of compulsion as a substitute for price incentives would drastically alter our social and economic system and seriously jeopardize these democratic principles. Such an alteration should come—if it is to come at all—not as an accidental and hysterical outgrowth of war but as a conscious and deliberate choice of our people. Nor will such change be necessary to our survival even in a new "total war," says Miller, if we set about promptly to design flexible purchasing techniques, to shape an intelligent fiscal policy, and to educate our industries properly. What is more, he blueprints a promising start toward at least the first of these goals.

The core of the book is devoted to a study of the armed services' procurement techniques in the years prior to and during World War II and to an appraisal of the extent to which the lessons learned in World War I were put to use in improving these techniques. The story is not an inspiring one. For despite the fact that World War I demonstrated the total ineffectiveness of the traditional rigid competitive bidding system in time of emergency, little was done to substitute negotiation techniques for that system in the years of peace between the wars. Nor was anything done to correct such evils as inadequate inventory procedure, too-rigid specifications, over-estimation of needs, and unwieldy decentralization of procurement agencies. Instead, emphasis was placed almost entirely on ways and means of shackling future war profiteers. The chief lesson apparently learned was that the cost-plus-percentage-of-cost contract widely used in World War I as a stop-gap substitute for competitive bidding was so open to abuse that it should be avoided at all costs. Similarly, the only work of the Nye Committee that gained the headlines was the evidence produced by it of profiteering, and its charges that the munitions-makers led us into war; the fact that its analysis of the War Department's procurement plans pointed up the need for complete overhauling of purchasing procedure was ignored. In fact, the author points out that "The practical result of the Nye investigation seems to have been to induce increasing timidity on the part of the services in their planning for industrial mobilization."² Thus, when faced with World War II, the procurement departments of the armed services found

1. P. 223-4.

2. P. 44-5.

themselves again unequipped to use with maximum effect the free-enterprise techniques available.

A detailed and well drawn picture is presented of the resulting procurement difficulties encountered in World War II and of the attempts made to meet these difficulties. The various forms of contract documents (letters of intent; cost-plus-fixed-fee; fixed-price; escalator; maximum-price; and target-price) are described, and their effectiveness in insuring the maximum flow of supplies with the minimum waste of our resources is evaluated. There is an interesting discussion of statutory renegotiation as a device for profit control, ending with the conclusion that it must be modified substantially and provide for liberal exemptions if it is not seriously to impair incentives to industrial efficiency. OPA's control over prices and WLB's control over salaries and wages, and the impact of these programs on the flow of goods to the military, including the controversy over whether price stabilization in the civilian goods area could be effective without similar stabilization of prices on military goods, are reviewed and appraised. In all of these studies, Miller is careful to give both sides of the story. Where free-enterprise clearly must be supplemented by direct controls, he concedes it. Nowhere does he attempt to prescribe a cure-all. Frequently he admits that the figures available are insufficient to justify reliable judgments. But step by step he examines what has been, points to obvious failures and suggests possible remedies.

The concluding chapters contain a summary of the entire problem, a re-statement of the principles and a ten-page list of 23 specific recommendations.³ Much of this material is repetitious, but these chapters do have the advantage of giving to one who must read as he runs a neat capsule treatment of the entire problem and of possible ways to solve it.

The book is not without faults. What book is? I should have liked a better job of organization. There is a good deal of point-belaboring and unnecessary summation which leads to the suspicion that too little time was spent in making a book out of the separate studies now titled as chapters. This makes for some impatient reading and a recurring feeling of "This is where I came in." Occasionally, too, the author was apparently unable to resist the temptation to prove by the use of ponderous prose that he is, after all, a scholar. But such criticisms are quibbles in the light of the merit of the book as a whole. The fact that it might be a better book does not destroy the fact that it is now a very good book indeed, and the product of the sort of scholarship that we need more of.

Above all else, it is clear that John Miller knows whereof he speaks. He has drawn not only on his own experience but on that of a host of both business and military men with first-hand knowledge of the field. This combined knowledge and experience he has expertly synthesized to give help on a national problem of great urgency. The only disheartening thing about it is that the need for his book should be so immediate.

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3. Pp. 248-58.

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